DIRECTOR OF PUBLIC PROSECUTIONS

v.

WARREN

HOUSE OF LORDS
LORD TEMPLEMAN, LORD ROSKILL, LORD BRIDGE OF HARWICH, LORD GOFF OF CHIEVELEY, LORD JAUNCEY OF TULLICHETTLE
5 NOVEMBER 1992

ROAD TRAFFIC: Drink-drive offence - Test applicable for detecting amount of alcohol in the body - Use of an intoximeter - When intoximeter not functioning - Use of blood or urine specimen - Procedure to be followed - Whether person required to give specimen has option to choose whether to give urine or blood specimen - Whether police can direct giving of particular type of specimen - Whether police must consider defendant's preference before making a decision on the type of specimen required.

The respondent was stopped, while driving, and given a roadside breath test which proved positive. He was accordingly arrested and taken to the police station where he duly provided two specimens of breath in the intoximeter. The police officer in charge then discovered that the intoximeter was not functioning properly and accordingly required a sample of blood from the respondent pursuant to s. 7(4) Road Traffic Act 1988.

The respondent provided the specimen of blood which on analysis was proved to contain a proportion of alcohol substantially exceeding the statutory limit.

On being charged the respondent was acquitted on the grounds that the police officer had failed to give the respondent an opportunity to consider whether he would prefer to give a sample of blood or urine if the choice were his and any reasons he had for that preference. In acquitting the respondent, the trial Court relied upon earlier decisions of the Divisional Court to the like effect. The appellant appealed by way of case stated.

Held:

[1] In a case where the necessity to require a specimen of blood or urine under s. 7(4) arises for one of the reasons specified in s. 7(3) what is required is for the constable to tell the driver why breath specimens cannot be taken or used; tell him that in these circumstances he is required to give a specimen of blood or urine but that it is for the constable to decide which; warn him that the failure to provide the specimen required may render him liable to prosecution; and then, if the constable decides to require blood, ask the driver if there are any reasons why a specimen cannot or should not be taken from him by a doctor.

[2] In a case where the driver's option is to be explained to him under *s.* 8(2), the driver should be told that if he exercises the right to have a replacement specimen taken under s. 7(4), it will be for the constable to decide whether that specimen is to be of blood or urine and, if the constable intends to require a specimen of blood to be taken by a medical practitioner, the driver should be told that his only right to object to giving blood and to give urine instead will be for medical reasons to be determined by the medical practitioner.

[3] In neither case is there any need to invite the driver to express his preference for giving blood or urine.

[Appeal allowed]

Cases referred to:

Director of Public Prosecutions v. Byrne [1991] RTR 119 ***(ovrl)***
Pine v. Collacott [1985] RTR 282 ***(refd)***
Anderton v. Lythgoe [1985] RTR 395 ***(refd)***
Johnson v. West Yorkshire MetropolitanPolice [1986] RTR 167 ***(refd)***
Hobbs v. Clark [1988] RTR 36 ***(ovrl)***
Director of Public Prosecutions v.Magill [1988] RTR 337 ***(ovrl)***
Regan v. Director of Public Prosecutions [1990] RTR 102 ***(ovrl)***
Director of Public Prosecutions v. Gordon [1990] RTR 71 ***(refd)***
Paterson v. Director of Public Prosecutions [1990] RTR 329 ***(refd)***

Legislation referred to:

Road Safety Act 1967
Road Traffic Act 1972, ss. 8(3), (4) & (6)
Road Traffic Act 1988, ss. 4, 5(l)(a), 7(l)(a)(b), (2), (3)(a)(b)(c), (4), (6), (7), 8(1)(2), 9 & 11(4)
Transport Act 1981

JUDGMENT

Lord Templeman

My Lords,

I have had the advantage of reading the speech prepared by my noble and learned friend, Lord Bridge of Harwich. I agree with the reasons given for having allowed the appeal.

Lord Roskill

My Lords,

I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Bridge of Harwich. I agree with it, and for the reasons which he gives I too would allow the appeal.

Lord Bridge of Harwich

My Lords,

The code which first made it a criminal offence to drive a motor vehicle with an amount of alcohol in the body exceeding a fixed statutory limit (introduced by the Road Safety Act 1967 and re-enacted in the consolidating Road Traffic Act 1972) was found in course of judicial construction to have been drafted in a way which afforded to many drunken drivers a variety of wholly unmeritorious avenues of escape from conviction. This led in due course to the enactment of a new code which was substituted for the relevant sections of the Act of 1972 by the Transport Act 1981 and is now found, without material alteration, in the Road Traffic Act 1988. As well as seeking to eliminate the old technicalities, in which it has, I think, been largely successful, the new code made one radical alteration in the nature of the evidence which could be relied on to prove the offence. Following the preliminary roadside "breathalyser" test, the old code provided that the specimen to be taken for analysis from the driver at a police station should be of blood or urine, in effect at the driver's option. The new code, while retaining the preliminary breathalyser test, provides that the normal method to be adopted at a police station in order to determine the amount of alcohol in the driver's body is by the provision by him of two specimens of breath for analysis by means of the approved device known as the intoximeter. It is only in the specific circumstances defined by the statute (when it is either impossible or inappropriate to obtain or to rely on breath specimens) that it is either necessary or permissible to require the driver to provide a specimen of blood or urine. But when such circumstances do arise, questions with respect to the appropriate procedure to be followed in requiring drivers to provide specimens of blood or urine have given rise to some difficulties in the Courts and it is to the resolution of those questions that this appeal is directed.

Before turning to the facts it will be convenient to set out the relevant sections of the Act of 1988 which provide as follows:

> 7. (1) In the course of an investigation into whether a person has committed an offence under s. 4 or 5 of this Act a constable may, subject to the following provisions of this section and s. 9 of this Act, require him -
>
> (a) to provide two specimens of breath for analysis by means of a device of a type approved by the Secretary of State, or
> (b) to provide a specimen of blood or urine for a laboratory test.
>
> (2) A requirement under this section to provide specimens of breath can only be made at a police station.
> (3) A requirement under this section to provide a specimen of blood or urine can only be made at a police station or at a hospital; and it cannot be made at a police station unless -
>
> (a) the constable making the requirement has reasonable cause to believe that for medical reasons a specimen of breath cannot be provided or should not be required, or
> (b) at the time the requirement is made a device or a reliable device of the type mentioned in subsection (l)(a) above is not available at the police station or it is then for any other reason not practicable to use such a device there, or
> (c) the suspected offence is one under s. 4 of this Act and the constable making the requirement has been advised by a medical practitioner that the condition of the person required to provide the specimen might be due to some drug;
>
> but may then be made notwithstanding that the person required to provide the specimen has already provided or been required to provide two specimens of breath.

(4) If the provision of a specimen other than a specimen of breath may be required in pursuance of this section the question whether it is to be a specimen of blood or a specimen of urine shall be decided by the constable making the requirement, but if a medical practitioner is of the opinion that for medical reasons a specimen of blood cannot or should not be taken the specimen shall be a specimen of urine.

(5) ...

(6) A person who, without reasonable excuse, fails to provide a specimen when required to do so in pursuance of this section is guilty of an offence.

(7) A constable must, on requiring any person to provide a specimen in pursuance of this section, warn him that a failure to provide it may render him liable to prosecution.

8. (1) Subject to subsection (2) below, of any two specimens of breath provided by any person in pursuance of s. 7 of this Act that with the lower proportion of alcohol in the breath shall be used and the other shall be disregarded.

(2) If the specimen with the lower proportion of alcohol contains no more than 50 microgrammes of alcohol in 100 millilitres of breath, the person who provided it may claim that it should be replaced by such specimen as may be required under s. 7(4) of this Act and, if he then provides such a specimen, neither specimen of breath shall be used.

The critical provisions with which we are concerned are s. 7(3) and (4) and s. 8(2) which reproduce provisions previously contained in s. 8(3), (4) and (6) respectively of the Act of 1972 as substituted by the Act of 1981.

The respondent was driving in Jermyn Street at 1.55 a.m. on 11 May 1990 when he was stopped and given a roadside breath test which proved positive. He was accordingly arrested and taken to Vine Street Police Station where he duly provided two specimens of breath in the intoximeter. The police officer in charge found, however, on checking the calibration of the intoximeter, that it was not functioning correctly. This gave rise to the situation contemplated by s. 7(3)(b) where "a reliable device of the type mentioned in subsection (l)(a) above is not available at the police station" and accordingly permitted the officer to require a specimen of blood or urine pursuant to s. 7(4). Given the complexities of some of the procedures which police officers are required to operate under this legislation, it is not surprising to find that the Metropolitan Police, and no doubt many other forces as well, have issued a set of elaborate and detailed instructions which indicate to an officer precisely how he is to proceed in any one of the many contingencies that may arise and which are designed to ensure that he acts in accordance with the statute as interpreted by the Courts. The officer in this case addressed the respondent precisely in terms appropriate to the contingency which had arisen as indicated in the Metropolitan Police pro forma instructions which were current in May 1990. He said to him:

> The approved evidential breath testing device cannot be used on this occasion because the calibration check has proved unsatisfactory. Accordingly, I require you to provide an alternative specimen, which will be submitted for laboratory analysis. The specimen may be of blood or urine, but it is for me to decide which. If you provide a specimen you will be offered part of it in a suitable container. If you fail to provide a specimen you may be liable to prosecution. Are there any reasons why a specimen of blood cannot or should not be taken by a doctor?

The respondent replied: "No." The officer then asked him: "Will you provide a specimen of blood?" to which the respondent replied "Yes". The doctor was called and the respondent provided a specimen of blood which on analysis proved to contain a proportion of alcohol substantially exceeding the statutory limit.

These facts were undisputed and one might have supposed the case to be a perfectly simple and straightforward one. But when the respondent appeared at the Bow Street Magistrates' Court to answer an information that he had committed the offence under s. 5(l)(a) of the Act of 1988 of driving with excess alcohol in the blood, he pleaded not guilty and at the close of the case for the prosecution a submission was made that he had no case to answer on the ground that the officer's requirement at Vine Street Police Station that he provide a specimen of blood had not been validly made in accordance with s. 7(4). The Magistrate upheld the submission and, on the prosecutor's appeal by way of case stated, his decision was affirmed by the Divisional Court (Nolan LJ and Potts J.). The prosecutor now appeals by leave of your Lordships' House.

I think it right to say at once that on the authorities, consisting of a series of previous decisions of the Divisional Court in which the provisions now contained in s. 7(3) and (4) and s. 8(2) of the Act of 1988 have been considered, neither the Magistrate nor the Divisional Court in this case had any option but to decide as they did. In particular, in *Director of Public Prosecutions v. Byrne* [1991] RTR119 Bingham LJ had given, in the course of his judgment, a summary of the law governing the procedure for requiring a specimen of blood or urine under what is now s. 7(4), as he derived it from previous decisions, in the following passage at p. 125:

> It is clear that when the s. 8(6) procedure comes into operation it is for the police officer to make the decision whether the sample to be provided shall be a sample of blood or urine, but the police officer must convey to the defendant that the sample to be required may be of either blood or urine and must give the defendant an opportunity to consider which sample he would prefer to give if the choice were his and any reasons he has for that preference. Thus, when the police officer comes to make his decision he must do so knowing of the defendant's preference and any reason the defendant may have given for it. He must not address the defendant in terms which suggest that the sample must be of one kind rather than the other unless and until the two possibilities have been explained to the defendant and a fair opportunity give
> to him to say, if he wishes, which he would prefer to give and why.

Now, it is true that Byrne was a case, unlike the present, where the s. (7)(4) procedure came into play, not for any of the reasons specified in s. 7(3), but because the driver was entitled under what is now s. 8(2) to claim that the breath specimens he had given be replaced "by such specimen as may be required under s. 7(4)." However, previous decisions had also laid it down that the identical procedure was to be followed in both cases. Hence it was the inevitable application of the law as stated in the passage cited from the judgment of Bingham LJ which effectively determined this case in the Courts below and it is the law as so stated which the appellant prosecutor now challenges as an unwarranted judicial gloss upon the statutory language, as opposed to a legitimate construction of it. The Divisional Court certified the following questions as raising points of law of general public importance involved in the Court's decision:

1. If a requirement is made, pursuant to s. 7(3) of the Road Traffic Act 1988 ("the Act"), for a specimen of blood or urine, is the constable making that requirement under a duty, by virtue of s. 7(4) of the Act, to:
   (a) convey to the suspect that the specimen to be provided may be of blood or of urine; and/or
   (b) give to that suspect an opportunity to consider which type of specimen he would prefer to supply, if the choice was his; and/or
   (c) give, expressly or otherwise, to that suspect an opportunity to give any reasons (including non-medical reasons) in support of any expression of choice?
2. Can a constable, when authorised by s. 7(3) of the Act to require a specimen of blood or urine (and absent any medical opinion that for medical reasons a blood specimen cannot or should not be taken), lawfully require the provision of blood (or urine) alone without, in speaking to the suspect, making reference to the alternative?
3. Do the words contained in paragraph 7B of the Metropolitan Police pro forma, as considered in the instant case, sufficiently comply with the requirements of s. 7 of the Act?
4. Is there any distinction to be drawn between the words required to be spoken by a constable
   (a) acting pursuant to s. 7(3) of the Act and
   (b) acting pursuant to s. 8(2) thereof, after the suspect has been told, in the latter case, of his right to claim that the breath specimen taken from him should be replaced by a blood or urine specimen?

The reported decisions of the Divisional Court which have addressed the issues raised by these questions have been very numerous and the doctrine which finds full expression in the passage from the judgment of Bingham LJ in Director of Public Prosecutions v. Byrne seems to have evolved gradually through those decisions. Before examining any of those authorities, I think it appropriate to consider first what the statute on its face appears to require.

A driver may be required to provide a specimen in accordance with s. 7(4) in two distinct circumstances. First, it may be necessary because it is impossible or inappropriate to

rely on specimens of breath for one of the reasons specified in s. 7(3). In this case it will be obligatory for the driver to provide the specimen which the constable decides to require, either blood or urine subject only to this, that if the constable requires blood but a medical practitioner is of opinion that for medical reasons a specimen of blood cannot or should not be taken, the obligation on the driver will then be to provide a specimen of urine instead. Failure to comply with the obligation (which, in the case of blood, arises if the driver withholds consent to the specimen being taken by a medical practitioner: see s. 11(4)) constitutes an offence, subject always to the defence that the driver had a "reasonable excuse" for the failure. There is no need here to consider what is capable of amounting to a reasonable excuse, but it suffices to say that the defence is clearly of very limited scope.

The second case in which a requirement may be made to provide a specimen in accordance with s. 7(4) is where the driver, having provided two specimens of breath one of which contains no more than 50 microgrammes of alcohol in 100 millilitres of breath, claims the right under s. 8(2) to have that specimen replaced by a specimen of blood or urine provided in accordance with s. 7(4). If the driver claims this right and then fails to provide the specimen duly required under s. 7(4), the sanction for that failure will be the use in evidence against him of the breath specimen which, *ex hypothesi*, proves an excess of alcohol above the statutory limit and accordingly in such case there will be no need, though it may be theoretically possible, to prosecute for a failure to provide a specimen without reasonable excuse under s. 7(6).

It has been said more than once in the decided cases that s. 7(4) cannot receive different constructions according to whether resort to the subsection arises for one of the reasons under s. 7(3) or because the driver exercises his right to claim to have his breath specimen replaced under s. 8(2). This is clearly right. But it does not follow that there may not be a difference in the procedures which are appropriate on the one hand in requiring the driver to provide a specimen of blood or urine under s. 7(4) where it is obligatory for him to do so because one of the circumstances specified in s. 7(3) has arisen, and on the other hand in informing the driver of **his** right under s. 8(2) to claim that the specimen of breath which he has given containing the lower proportion of alcohol should be replaced by a specimen of blood or urine under s. 7(4).

Taking the second case first, it is clear that under s. 8(2) the driver, in order that he may decide whether or not to claim that the breath specimen be replaced, should be fully informed of the nature of the option open to him and what will be involved if he exercises it. He should be told that the specimen of breath which he has given containing the lower proportion of alcohol exceeds the statutory limit but does not exceed 50 microgrammes of alcohol in 100 millilitres of breath; that in these circumstances he is entitled to claim to have this specimen replaced by a specimen of blood or urine if he wishes; but that, if he does so, it will be for the constable to decide whether the replacement specimen is to be of blood or urine and that if the constable requires a specimen of blood it will be taken by a doctor unless the doctor considers that there are medical reasons for not taking blood, when urine may be given instead. I can see no ground whatever, on the face of the statute, why in a s. 8(2) case the driver should be invited to state whether he prefers to give blood or urine or to state any reasons for his preference. Indeed, to invite him to do so, it seems to me, can only be misleading in suggesting that the driver is entitled to some say in the matter. The statute gives him no such say. The driver is faced with the prospect of conviction on the basis of the breath specimen which he has given containing the lower proportion of alcohol. His only chance of escape from that prospect is by opting to give and then in fact giving a replacement specimen of whichever kind the constable requires of him, subject only to his right to object to giving blood on medical grounds, and, if they are accepted by the doctor, then to give urine instead. Again, so far as the language of the statute is concerned, I can see no reason in principle why the constable in the course of explaining to the driver his rights under s. 8(2) should not tell him, if it be the case, that he, the constable, will require the replacement specimen to be of blood.

In a case where the reason for requiring a specimen of blood or urine arises under s. 7(3), there is no question of the driver having any

option to exercise. Hence, whatever necessity a there may be to explain the position to him, the reasons why it is necessary to give such an explanation cannot be the same as those which arise under s. 8(2). Again, on the face of the statute, I cannot see any reason why in this case the constable should do more than tell the driver the reason under s. 7(3) why breath specimens cannot be taken or used; tell him that in these circumstances he is required to give a specimen of blood or urine but that it is for the constable to decide which; warn him that a failure to provide the specimen required may render him liable to prosecution; and then, if the constable decides to require blood, ask the driver if there are any reasons why a specimen cannot or should not be taken from him by a doctor. This will certainly give the driver the opportunity to raise any objection he may have to giving blood, either on medical grounds or indeed for any other reason which might afford a "reasonable excuse" under s. 7(6). Here again, provided the driver has such an opportunity, I can see nothing in the language of the statute which would justify a procedural requirement that the driver be invited to express his own preference for giving blood or urine, either before a constable indicates which specimen he will require or at all.

I must now turn to the decided cases to see whether they refute the *prima facie* views I have formed and expressed in the foregoing paragraphs based on the construction of the statute and indeed otherwise to see what light they shed on the issues falling for decision. Most of the reported decisions were made under the provisions of the Act of 1972 but for convenience I shall throughout refer to the relevant provisions under the numbers of the sections and subsections as they appear in the Act of 1988. For brevity I shall refer to those cases which arose under s. 8(2) as "driver's option" cases and those which arose under s. 7(3) as "obligatory s. 7(4)" cases. As I have already said, the cases are very numerous. It would be tedious and is not, I think, necessary to examine them all but I must seek to trace the development of the law through the main decisions and I intend to refer to them in chronological order.

The earliest case was *Pine v. Collacott* [1985] RTR 282. This was an obligatory s. 7(4) case. Here the constable told the driver that there was no device available at the station for taking specimens of breath and then simply required him to provide a specimen of blood. The driver refused and was in due course convicted by justices of failing to provide a specimen without reasonable excuse. On appeal to the Crown Court it was held that the defendant had no case to answer on the ground, put shortly, that the constable had not independently decided whether to require blood or urine but had simply followed the Metropolitan Police pro forma instruction then current. On the prosecutor's appeal to the Divisional Court this decision was in turn reversed. Delivering the leading judgment, Stephen Brown LJ, after referring to the provisions of s. 7(4), said, at p. 287:

> In my judgment it does not require the constable making the request of the requirement to weigh up and balance competing considerations. For whatever reason the Act provides that it is his responsibility to make the request, either for blood or urine. It does not give the subject of the investigation at that stage the opportunity to challenge the matter, other than upon medical reasons.
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> In this case it is quite clear that following the procedure of s. [7(4)] a requirement was made. In my judgment it was a lawful requirement.

Insofar as this decision approves a requirement made under s. 7(4) to provide a specimen of blood simpliciter, without making any reference to the alternative of urine, it has been effectively overruled by later cases and I shall defer further consideration of it until I come to those cases.

Anderton v. Lythgoe [1985] RTR 395 was a driver's option case where the driver, having given two breath specimens, neither of which contained more than 50 microgrammes of alcohol in 100 millilitres of breath, was not informed of his right under section 8(2) to require that a replacement specimen be provided in accordance with s. 7(4). In a prosecution for an offence under s. 5 of driving with excess alcohol in the blood the prosecution relied on the breath specimen in evidence. The Divisional Court (Watkins LJ and Nolan J) affirmed the decision of justices refusing to convict. Delivering the leading judgment, Nolan J., having referred to the breath specimen provided by the defendant and to s. 8(2) said, at p. 400:

> The officers were found not to have told the defendant of his rights under that section. Were they obliged to do so? The position, as it seems to me, is that the legislation, by *s.* [8(2)], contemplates two possible ways in which guilt or innocence are to be established. One is by the breath sample. The other - if the subject so chooses - is by the sample of blood or urine. The alternatives must both be made available to the subject if the plain purpose of the subsection is to be achieved.

Accordingly it was held that the breath specimen had been inadmissible in evidence. I entirely agree with this decision and with the passage cited but it is important to note that when Nolan J. spoke of the alternatives which "must both be made available to the subject" he was, as I think, clearly referring to the alternative on the one hand of allowing the breath specimen to stand and on the other hand of exercising the right to have it replaced "by a specimen of blood or urine in accordance with s. 7(4). If Nolan J. was intending to say that, in the situation which he was considering, the alternatives of giving either blood or urine "must both be made available to the subject", this was simply wrong.

Johnson v. West Yorkshire Metropolitan Police [1986] RTR 167 was another driver's option case. In offering the driver the option of providing a replacement specimen for the specimen of breath which he had given containing not more than 50 microgrammes of alcohol in 100 millilitres of breath, the constable indicated that the replacement specimen he would require would be of blood. The driver objected on the ground that he was averse to needles and that he had once fainted when giving a sample of blood. After some questioning of the driver, the constable concluded that his objection to providing a specimen of blood was invalid and treated him as having failed to provide a specimen under s. 7(4). Accordingly the driver was prosecuted for an offence of driving with excess alcohol in the breath under s. 5 and the prosecution relied on the specimen of breath which he had given to establish the offence. The Divisional Court (Mustill LJ and Otton J.) affirmed his acquittal by the Crown Court (which had allowed an appeal against conviction by justices) on the ground that the defendant, when required to give blood, had raised an objection capable of amounting to a medical reason why blood should not be taken and that this could only be determined by a medical practitioner. Accordingly the defendant had effectively been deprived of his right to have the breath specimen replaced by a specimen of blood or urine in accordance with s. 7(4) and, as in *Anderton v. Lythgoe*, the breath specimen had been inadmissible. I thought it right to refer to this decision with which again I entirely agree. But I have not found anything in the careful judgment of Mustill LJ which throws light on the issues presently under consideration.

The next and perhaps most important case is *Hobbs v. Clark* [1988] RTR 36. This was again a driver's option case. After taking breath specimens, neither of which contained more than 50 microgrammes of alcohol in 100 millilitres of breath, the only indication by the constable given to the driver of his right to provide a replacement specimen was in these words:

> You may have a doctor called if you so wish to take a sample of blood for the purpose of having it analysed to confirm the readings given by the machine. Do you wish to do this?

Not surprisingly, the defendant declined this offer. Now, on any view, this was both an inadequate and a misleading indication to the driver of the nature of his right under s, 8(2) and what the exercise of that right would involve and I agree entirely with the decision of the Divisional Court allowing the defendant's appeal from his conviction of an offence under s. 5 by justices based on the admission in evidence of the breath specimen. But I regret I cannot agree with some of the reasoning in the judgments. May LJ said at p. 40:

> But the authorities make it quite clear ... that before the constable is in a position to choose between a specimen of blood or a specimen of urine on the defendant's claim that one or other specimens should be substituted for the specimen of breath, the defendant must be made aware not merely that he can have the breath specimen substituted by some other specimen in general terms, but that the alternative specimen can be one either of blood or of urine, although in the last resort, subject to the proviso to subsection (4) as to medical practitioners, the choice is that of the police officer.

He then referred to a passage from the judgment of Nolan J. in *Anderton v. Lythgoe* including the words which I have earlier cited.

May LJ, on p. 41, refers to a submission made by Counsel for the prosecution that Nolan J's reference to "the alternatives" was a reference to a choice between breath on the one hand and blood or urine on the other hand and not to a choice between blood and urine. In other words, Counsel was submitting that the language used by Nolan J. bore the meaning which I have earlier indicated I think it was intended to bear. But May LJ rejected this submission which implies that he read the judgment of Nolan LJ as authority for the proposition that in a s. 8(2) case the alternatives of giving either blood or urine "must both be made available to the subject". This no doubt explains his description in the earlier passage which I have cited of the constable's choice as being one of "last resort". This seems to be an attempt to reconcile the proposition with the statutory language, but in fact they are irreconcilable.

The judgment of Roch J. carries the matter a step further. He says at pp. 41-42:

> The constable has a duty to tell the defendant of his right to have the specimens of breath replaced by what I shall call a s. [7(4)] specimen, where the intoximeter readings show 50 microgrammes of alcohol or less in 100 millilitres of breath. That there is such a duty is established by the authority of *Anderton v. Lythgoe* [1985] RTR 395. In my judgment, that duty is not discharged by the constable unless he tells the person who has provided the samples of breath of both types of specimen referred to in s. [7(4)]. Once the constable has told that person of both types of specimen and has listened to anything that that person has to say as to which type of specimen he would wish to provide, the constable may decide whether the specimen to be provided should be a specimen of blood or urine. However, the constable's decision, in my judgment, must be an informed decision. It cannot be an informed decision unless the person who has provided the specimens of breath knows that there are two possible specimens which can be substituted for them and has been given the opportunity of making representations as to which of the two types of specimen it should be.

Now all this reasoning can only be intended, I think, to give effect to the language of Nolan J., interpreted in the same sense by Roch J. as by May LJ. So here we have the genesis of the doctrine of "driver's preference" which comes to full fruition in the judgment of Bingham LJ in Director of Public Prosecutions v. Byrne, all based, as it seems to me, on a misreading of a few words in an earlier judgment as enunciating a proposition which simply cannot stand with the statutory language.

Hobbs v. Clark was considered and followed in two further driver's option cases, *Director of Public Prosecutions v. Magill* [1988] RTR 337 and *Regan v. Director of Public Prosecutions* [1990] RTR 102, but I find nothing in the judgments in these cases which provides independent support for what I have called the doctrine of driver's preference.

In Director of *Public Prosecutions v. Gordon* [1990] RTR 71 it was held that *Hobbs v. Clark* applied not only to driver's option cases but also to obligatory s. 7(4) cases and this was followed in *Paterson v. Director of Public Prosecutions* [1990] RTR 329. The effect of these cases is to overrule Pine v. Collacott. The essential reasoning in these two cases is that s. 7(4) cannot bear two different constructions. This is an indisputable proposition. But as I have said earlier, I do not think this necessarily precludes a difference in the procedures which are appropriate on the one hand where it is necessary to explain to the driver his right to claim a replacement specimen taken under s. 7(4) and what the exercise of that right involves and, on the other hand, where the driver is obliged, subject to any rights of objection, to provide the specimen the constable requires. If Pine v. Collacott itself had originally been under challenge in your Lordships' House on the ground that in an obligatory s. 7(4) case the simple requirement that the driver provide a specimen of blood without reference to the possible alternative of urine was insufficient, I should have been inclined to reject that challenge. But since the cases of Gordon and Paterson have now laid down that in obligatory s. 7(4) cases there must be a reference to the possible alternative of giving urine and since this procedural requirement, shorn of the doctrine of driver's preference, appears to present no difficulty to the police, it would now, I think, be inappropriate to reverse those decisions to the extent of abrogating this procedural requirement.

At the end of this necessarily lengthy examination of the decided cases I have found nothing which causes me to depart from the view

I expressed before embarking on that examination as to the appropriate procedure to be followed under ss. 7(3) & 8(2) considered simply on the basis of the statutory language. Restating those views in summary form, in a case where the necessity to require a specimen of blood or urine under s. 7(4) arises for one of the reasons specified in s. 7(3), what is required is no more and no less than the formula used in the instant case or words to the like effect. In a case where the driver's option is to be explained to him under s. 8(2), the driver should be told that if he exercises the right to have a replacement specimen taken under s. 7(4), it will be for the constable to decide whether that specimen is to be of blood or urine and, if the constable intends to require a specimen of blood to be taken by a medical practitioner, the driver should be told that his only right to object to giving blood and to give urine instead will be for medical reasons to be determined by the medical practitioner. In neither case is there any need to invite the driver to express his preference for giving blood or urine.

I have not felt it necessary to examine the detailed facts of all the earlier decisions or to consider whether the decisions themselves could or could not be supported. But, as I have indicated, much of the reasoning in the judgments following *Hobbs v. Clark* and, in particular the summary of the law given by Bingham LJ in *Director of Public Prosecutions v. Byrne* must now be considered unsound.

Allowing the appeal automatically indicates an affirmative answer to the third certified question. To attempt to provide succinct answers to the other certified questions as formulated might, I think, be misleading and therefore inappropriate. I think it better to say that they should be answered on the basis of the general discussion of the issues in this opinion.

I would allow the appeal and set aside the answers given in the order of the Divisional Court to the questions posed by the Magistrate in the case stated. The appellant prosecutor does not, however, seek an order that the case be remitted to the Magistrate to continue the hearing. In accordance with the conditions on which leave to appeal was given the orders for costs made below will stand and the appellant must pay the respondent's costs in this House.

Lord Goff of Chieveley

My Lords,

I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Bridge of Harwich. I agree with it, and for the reasons given, I too would allow the appeal.

Lord Jauncey of Tullichettle

My Lords,

I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Bridge of Harwich. I agree with it, and for the reasons given, I too would allow the appeal.